DRED SCOTT DRAWER 10D SLAVERY ATTITUDE

# Slavery

## Attitudes about Slavery

## Dred Scott

Excerpts from newspapers and other sources

From the files of the

Lincoln Financial Foundation Collection

But Mr. Lincoln himself set the bad example of disobedience to the Courts. In his Chicago speech, July 10, 1858, he said:

"If I were in Congress, and a vote should come up on a question whether slavery should be prohibited in a new Territory, in spite of the Dred Scott decision, I would vote that it should."

# THE DRED SCOTT DECISION.

BY OLIVER JOHNSON.

THE editorial article on the Dred Scott Decision, in THE INDEPENDENT of April 3d, surprises me not a little, and seems to call for criticism and remonstrance. I cannot believe it was so intended, and yet it reads like an apology for a judicial act which revealed the full infamy of the conspiracy to perpetuate slavery in the United States by an interpretation of the Constitution which doomed the Negro to eternal and remediless chattelhood, with no more standing in the Supreme Court than a dog or a pole-cat. I have not taken the trouble to consult the files, but I am confident that THE INDEPENDENT in 1856 spoke of Chief-Justice Taney's opinion in a far different strain. The judgment of the court having failed of its object and involved its authors in disgrace and infamy, the descendants of the judges who took part therein, are, naturally, anxious to find some excuse for them that may at least relieve the blackness of the smirch which they so unfortunately and gratuitously affixed to their own reputations. The colors, however, are fast, and the stain is ineffaceable. The tears of angels, if we could imagine them to flow in such a cause, would not suffice to blot it. But the *crying* angels never obliterate the work of their *recording* brothers. The record, once made, will stand forever. The god slavery, which the Supreme Court worshiped and obeyed, is dead; but the infamy of such worship and obedience survives, defying all excuses and apologies.

The plea that the phrase, "the Negro had no rights which the white man was bound to respect," occurs only in the historical part of Judge Taney's opinion, and refers primarily to the state of opinion one hundred years before the Revolution, is purely technical and amounts to nothing; for, the infamous sentiment, instead of being repudiated by the judge for its inhumanity, is accepted by him as legally sound, and made the basis of his entire judgment. His argument, drawn out at an almost interminable length of wordiness, runs back for its foundation to a postulate as false historically as it is outrageous in point of morality. Strike out that lie from the opinion, and Judge Taney's judicial structure has not a leg to stand upon. He takes that lie to his breast, hugs it and coddles it as if it were a precious truth, and thus finds it an easy as well as a congenial task to grind a whole race of men under his judicial heel. The false assumption that, one hundred years before the Revolution, it was "the fixed and universal opinion in the civilized portion of the white race that the Negro had no rights which the white man was bound to respect," he makes his guide in construing the Declaration of Independence and the Constitution of the United States. He insists that the legal status of the Negro in 1776 was exactly what it was a hundred years before; that it was in no wise changed by the war or by subsequent events, and remained, in 1856, so far as the United States Government was concerned, exactly what it was a century and a half earlier. *Therefore*—such is the argument—the Negro is incapacitated for being a citizen of the United States, and has no more standing in its courts than a wild beast.

Such is the Dred Scott decision. Its whole meaning and spirit is accurately summed up in the words "the Negro has no rights which a white man is bound to respect." Originally used as descriptive of ancient opinion, they are taken up, if not formally, yet really and truly, and made the informing vitalizing breath of the judgment of the court. But the conspirators left God out of their calculations, and so their counsel came to naught. If they had succeeded, and slavery, by the consent of the people, were now fastened to the neck of this Republic, would the descendants of the judges be to-day running about to explain that they did not mean what they said, that they acted under constraint of legal principles and precedents, which they did not indorse and which were as odious to them as to others? I trow not. In that case what is now so anxiously sought to be explained away, as at the worst only an excusable mistake of judgment, would have been boldly defended as meritorious. "He that sitteth in the heavens shall laugh; the Almighty shall have them in derision."

NEW YORK CITY.

N. Y. Independent
4/24/84

from "Century Magazine", June 1887
Vol. XXXIV, No. 2, p. 208



With this speech Sumner resumes his place as a conspicuous figure and an indefatigable energy in national politics and legislation, tireless in attacking and pursuing slavery until its final overthrow.

### THE DRED SCOTT DECISION.

Deep and widespread as hitherto had been the slavery agitation created by the repeal of the Missouri Compromise and by the consequent civil war in Kansas, an event entirely unexpected to the public at large now suddenly doubled its intensity. This was the announcement, two days after Buchanan's inauguration, of the decision of the Supreme Court of the United States in the Dred Scott case. This celebrated case had arisen as follows:

TLM #1346

DRED SCOTT.

HARRIET, WIFE OF DRED SCOTT.

Two or three years before the Nebraska Bill was thought of, a suit was begun by a negro named Dred Scott, in a local court at St. Louis, Missouri, to recover his and his family's freedom from slavery. He alleged that his master, one Dr. Emerson, an army surgeon, living in Missouri, had taken him as his slave to the military post at Rock Island in the State of Illinois, and afterwards to Fort Snelling, situated in what was originally Upper Louisiana, but was at that time part of Wisconsin Territory, and now forms part of the State of Minnesota. While at this latter post Dred Scott, with his master's consent, married a colored woman, also brought as a slave from Missouri, and of this marriage two children were born. All this happened between the years 1834 and 1838. Afterwards Dr. Emerson brought Dred Scott and his family back to Missouri. In this suit they now claimed freedom, because during the time of residence with their master at these military posts slavery was there prohibited by positive law; namely, at Rock Island by the ordinance of 1787, and later by the Constitution of Illinois; at Fort Snelling by the Missouri Compromise act of 1820, and sundry other acts of Congress relating to Wisconsin Territory.

The local court at St. Louis before which this action was brought appears to have made short work of the case. It had become settled legal doctrine by Lord Mansfield's decision in the Somersett case, rendered four years before our Declaration of Independence, that "the state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only positive law. . . . It is so odious that nothing can be suffered to support it but positive law." The learned chief-justice therefore ordered that Somersett, being claimed as a Virginia slave brought by his master into England, and attempted to be carried away against his will, should be discharged from custody or restraint, because there was no positive law in England to support slavery. The doctrine was subsequently modified by another English chief-justice, Lord Stowell, in 1827, to the effect that absence of positive law to support slavery in England only operates to suspend the master's authority, which is revived if the slave voluntarily returns into an English colony where slavery does exist by positive law.

The States of the Union naturally inherited and retained the common law of England, and the principles and maxims of English jurispru-

## OWNER OF DRED SCOTT DEAD.

### Mrs. C. C. Chaffee, Who Finally Liberated the Famous Slave, Is Dead. 1903

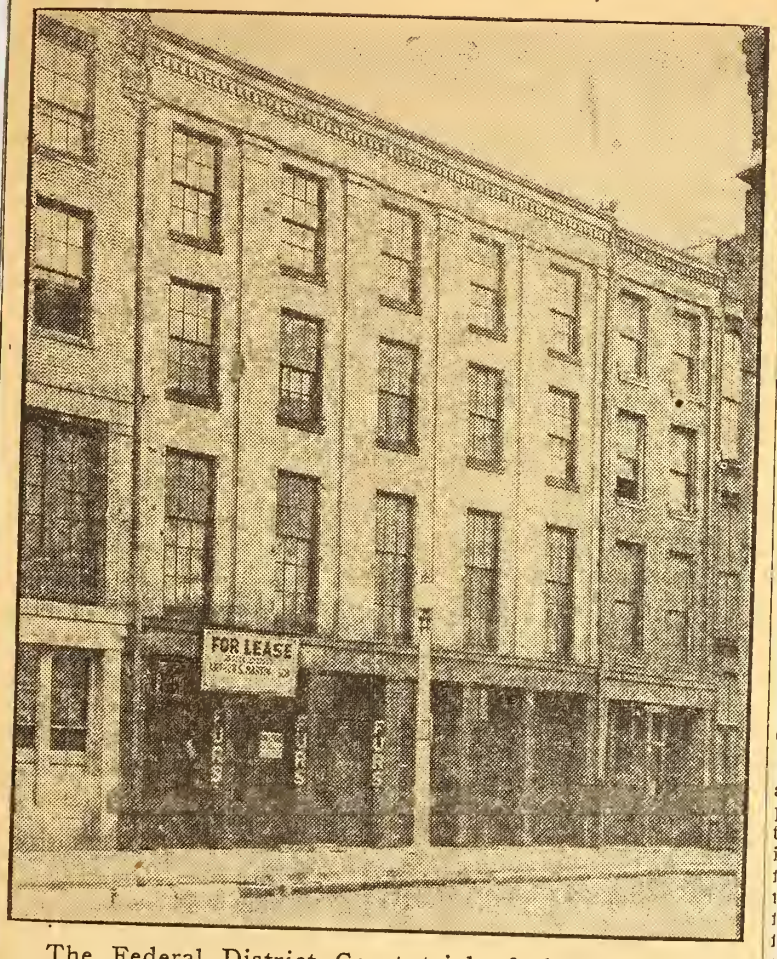
Springfield, Mass., Feb. 12.—Mrs. C. C. Chaffee, who was eighty-eight years old, died in this city today. Death resulted from old age. She was the widow of Dr. C. C. Chaffee, and was at one time the owner of Dred Scott, over whom the famous legal controversy was waged, which practically annulled the Missouri Compromise. To Mrs. Chaffee the slave had been left by her first husband, Dr. Emerson of St. Louis, and she had practically given him his freedom.

A St. Louis lawyer brought suit on the claim that Scott had been freed by being taken into a "free" State. He hoped by this to gain Scott's freedom and obtain fourteen years' wages for him. The local court decided in his favor, but in three succeeding courts up to the United States Supreme Court it was declared that the negro's ownership was not affected by his being taken to a free soil. Immediately after the suit had been decided in her favor Mrs. Chaffffee liberated the man.

New York Commercial

St. Louis Daily Globe-Democrat, Sunday Morn

# Historian Sheds New Light on Dred Scott Slave Case Here




The Federal District Court trial of the famous Dred Scott slavery case, from which the litigation was taken to the United States Supreme Court and its historic decision, was held on an upper floor of this old commercial building at 113-15 North Main street, it has been ascertained through research by the National Park Service for the Jefferson National Expansion Memorial project. The federal trial was held in the structure in 1854, after a suit by the slave for freedom brought in the state court had been tried in the Old Courthouse and appealed to the Missouri Supreme Court.

Although the Old Courthouse at Broadway and Market street has been popularly regarded as the principal source from which the Dred Scott case sprang into national importance as a contributing cause to the civil war, an old vacant commercial building at 113-15 North Main street, has been determined to be the scene of the Federal Court phase of the litigation through which the case finally reached the United States Supreme Court, and its historic decision, Dr. T. M. Pitkin, historian of the National Park Service, said yesterday.

Data on the Dred Scott case has been assembled by Dr. Pitkin and other Park Service representatives in their search for historical material connected with the Jefferson National Expansion Memorial project on the river front.

Roswell M. Field, father of Eugene Field, the poet.

An agreed statement of the facts in the case was submitted by both sides, and, apparently, the only arguments were on points of law, Dr. Pitkin said. On May 15, at the direction of Judge Wells, the jury returned a verdict against Scott.

Field appealed the case to the United States Supreme Court through a writ of error. In 1857, a majority of the Supreme Court ruled Scott to be still a slave, declaring Congress had no power to prohibit slavery in the territories, and holding the Missouri Compromise unconstitutional. The decision caused a furor that helped to split the Democratic party, elect Abraham Lincoln to the presidency, and bring on the civil war.

ng, May 22, 1938.

## ON FREE SOIL

Scott's suit to have himself declared a free Negro because he had lived for several years on free soil was first brought in the St. Louis County Circuit Court in 1846 and tried twice in the Old Courthouse as a state case with indeterminate results, Dr. Pitkin related.

But after ownership of Scott and his family had been transferred to a resident of New York, Scott, in claiming residence in Missouri in 1853, brought a new action in the Federal District Court here, based on diversity of citizenship, the historian said.

When Federal Judge Robert Wells arrived in St. Louis early in 1854 on one of his regular circuit calls, it was found there were no accommodations for the Federal Court trials in the Old Courthouse and the clerk was forced to find quarters for holding court in a back room above some stores in a building at 38 Main street, Dr. Pitkin said. When the street numbering system was revised some years later the address of this building was changed to 113-15 North Main street, he explained.

The federal grand jury, in is report to the Judge at that time, complained about the court being compelled to meet in a back room and to wander from place to place because accommodations were lacking at the Courthouse, he said.

## ATTORNEY WAS FIELD

Dred Scott's plea for liberty was tried before Judge Wells, and a jury in the makeshift court probably a day or so before May 15, 1854, the Park Service man recounted. The slave's lawyer was Scott's case was based on the fact his master, Dr. John Emerson, a surgeon in the United States Army, took the Negro with him when he was transferred from St. Louis to Rock Island, Ill., and then to Fort Snelling, in what is now Minnesota, but was then free territory of the United States.

Several years after he accompanied Dr. Emerson back to St. Louis, Scott sued for freedom from the widow of the surgeon in the St. Louis County Circuit Court. While this case was being fought through the state courts, Mrs. Emerson married an antislavery man from Massachusetts, Dr. Pitkin related. To relieve him of embarrassment, she transferred her slaves to John F. A. Sanford, a brother, with business interests in St. Louis and New York.

Sanford's New York residence enabled Scott and his backers to bring their suit in the Federal Court here, and paved the way for the United States Supreme Court decision.

The Main street building in which the Federal Dstirict Court trial was conducted is a four-story structure. It is owned by the Rogers Realty and Investment Company.

Dr. Pitkin said he personally did not believe there should be any attempt made to retain the old structure as part of the river front memorial.

---

The rotunda of the old Hotel St. Louis in New Orleans was famous as a slave market before the civil war.

# Davenporter's Will Made History

## Dred Scott Decision Leading Up to Civil War Had Its Roots in City Where John Emerson, Owner of Slave, Lived and Died and Wrote Will That Indirectly Set Brother Against Brother —Dr. Snyder Tells Story of Brief History of Emerson.

By CHARLES W. DALY.

Lincoln's birthday dawning this morning on a world torn with dissension over isms that endanger the freedom and individuality of men, tho known by different names than in the days of the Great Emancipator, naturally turns the thoughts to the days in which he lived and struggled successfully to save the republic.

It is timely to mention the story by the Rev. Charles E. Snyder of Davenport published in a recent issue of the state's historical quarterly, the Annals of Iowa, on John Emerson, owner of Dred Scott.

He says of Dr. Emerson: "He was an obscure man, so far as he himself was concerned; no man knows the resting place of his ashes. Yet in his will he unknowingly left behind a legacy of political dynamite that was to shake the nation and which was to write his name posthumously into a tragic chapter of our national history. It was not an unimportant event that took place that December day in the small Iowa village."

Dr. Emerson came to Davenport in 1833 as assistant surgeon at the Rock Island arsenal, Dr. Snyder writes in his historic sketch. He remained three years and then was transferred to Fort Snelling at the junction of St. Peter's river with the Mississippi.

That he was enamored of the locality is shown by the fact that shortly after his arrival he staked out a half section of land with its eastern boundary practically where Fourteenth street, Bettendorf, now is located. This land, except for a small portion he continued to own until his dying day.

### Purchased Dred Scott.

Sometime prior to his coming to Fort Armstrong occurred the event which was to be Emerson's chief bid for fame; he bought a negro slave, Dred Scott, whose name was destined to become a household word from the Atlantic to the Missouri, writes Dr. Snyder.

"Emerson built a log cabin on his claim, near the river, along where State street, Bettendorf, now goes," the article says.

DRED SCOTT

"There is a tradition that when he was transferred to Fort Snelling in 1836, he left Dred on the farm to look after things, but that also seems to be a tradition. If that occurred Dred could have stayed only a short time, for in 1836 he was married at Fort Snelling to Harriet, a negro woman whom Emerson bought there from Major Taliaferro."

When Emerson discovered he was to be transferred to Fort Snelling he gave to Antoine LeClaire, his close friend, power of attorney to take care of his interests in his Iowa claim. The original of that document is now among the LeClaire papers in the historical library of the Davenport Public Museum.

### Emerson-LeClaire Letters.

Letters which passed between Emerson and LeClaire show the attachment that Emerson maintained for his Iowa home and reveal some of the problems of land settlement in Iowa's early period. Dr. Snyder includes many of these letters in his article.

Dr. Snyder, tracing the movements of Dr. Emerson and his slave, Dred Scott, says court records show that Emerson left Fort Snelling in 1838. The records also show that Dred Scott and Harriet went to St. Louis on the steamboat "Gypsy" the same year, their elder daughter, Eliza, being born

SUNDAY MORNING—THE DAVENPORT DEMOCRAT AND LEADER—FEBRUARY 12, 1939

that he made the dynamic will. The phrase that set a nation afire was innocent enough. It stated that "all the rest residue & remainder of my estate & effects real & personal whatsoever & wheresoever" be given to Eliza Emerson in trust. This means, says Dr. Snyder, that Dred Scott's family was included among the assets.

Mrs. Emerson was married in 1850 to Dr. Calvin C. Chaffee, an active abolitionist, and neither he nor his wife wanted to be encumbered with human chattels. Therefore a transfer of ownerships was made to Mrs. Emerson's brother, John F. A. Sanford.

Previously in 1846, before her second marriage, Mrs. Emerson had decided to emancipate the Scotts. The court of first instance decided that as Dred Scott had been taken into free territory he had gained his freedom. The supreme court of Missouri reversed the decision. Then the case was appealed to the United States supreme court which sustained the Missouri supreme court in its famous decision of 1857, "a decision," Dr Snyder says, "that shattered the squatter sovereignty dream of Stephen A. Douglas and which did much toward precipitating the bloody struggle of four years later — grave consequences which grew out of the will made in a sick room in the LeClaire house in Davenport on a cold December day in 1843."

### Slave Was Worthless.

All evidence was that Dred Scott was worthless but while his case was pending "he was cared for in a very princely fashion for a slave, by the man who made him the famous exhibit 'A.' He didn't know what it was all about, but he knew he had become somebody and after the famous decision of March, 1857, he was somebody more."

Scott, who was known as Dred or Old Dreadful in St. Louis, lived to witness the emancipation and died at about the age of 60.

Concluding Dr. Snyder writes: "And because Dr. Emerson felt the presence of death beside his bed as he lay in a hotel room in a little village on the fringes of civilization, he was moved to look beyond his own ebbing hours and into the future of the baby Henrietta whom he had fathered. His fainting voice dictated a will in carefully chosen words which Henrietta's mother tried to observe. And because a certain blackman in St. Louis nominally was included among the assets which Mrs. Emerson was directed to conserve, there are many monuments at Gettysburg and at Antietam and Mrs. Emerson's native state was wounded and scarred by civil war. Tragedy abided unseen in that hotel room in Davenport on that December day, and then moved on in the silent way that Euripides sensed so long ago in Athens, while the innocent author's body mouldered in an unknown grave and his name shot up into fame that he would not have wanted."

on the boat. But further letters from Emerson to LeClaire from Fort Snelling show that the surgeon returned to his post. As he referred to Mrs. Emerson in the letters he evidently went to St. Louis in 1838 to be married. Emerson's wife was Eliza Irene Sanford, daughter of Alexander Sanford.

Dr. Emerson was sent to Florida shortly after 1840 where the Seminole Indians were at war. He resigned from the army in 1842 and came back to Scott county, residing on his claim for a brief period and then establishing himself at the LeClaire hotel for the practice of his profession. He bought two lots on the south side of Second street, east of Perry street, and began the erection of a brick residence. The house was pointed out for years as the residence of the owner of Dred Scott, but Dr. Snyder's researches show that the physician never lived in it. Shortly before its completion he died of "consumption" in the LeClaire hotel.

### Death-Bed Will.

It was while on his death bed

# DRED SCOTT - A CHRONOLOGICAL OUTLINE

1800 - Dred Scott was born a negro slave in southeastern Virginia about this year.

1830 - His master, Peter Blow, brought Dred to St. Louis when the Blow family migrated here. Within the next few years Peter Blow died and left Dred Scott to his daughter.

1833 - Dred Scott was sold to Dr. John Emerson, a surgeon in the United States Army stationed at Jefferson Barracks.

1834 - When Dr. Emerson moved with his unit to Fort Armstrong at Rock Island, Illinois, Scott was taken along. Under the Northwest Ordinance of 1787 and the state constitution of 1818, slavery was prohibited in Illinois. However, Army and Navy officers did not consider themselves citizens of a state merely because they happened to be stationed there. Dozens of other officers besides Dr. Emerson brought slaves to Fort Armstrong and other posts in the North.

1836 - The troops with whom Dr. Emerson served were moved to Fort Snelling on the west side of the Mississippi in what is now Minnesota. Dr. Emerson took his slave along, although Fort Snelling was in territory from which slavery was barred by the Missouri Compromise of 1820. Not long after arriving at the Fort, Dr. Emerson bought a slave girl named Harriet from Major Taliaferro, an officer from Virginia. Dred and Harriet were married with their master's consent.

1837 - Dr. Emerson was transferred, probably to Fort Gibson. He left his slaves hired out to another officer at Fort Snelling.

1838 - Dred and Harriet were sent down to Dr. Emerson at Jefferson Barracks. On board the steamboat en route their first daughter, Eliza, was born.

1843 - Dr. Emerson died. He had been sent to Florida during the Seminole War, leaving his slaves hired out at Jefferson Barracks. He returned from the war, but died shortly after. The Scotts were left to his widow, Irene, in trust, for the benefit of their minor daughter.

1846 - Dred and Harriet prepared to bring suit against Mrs. Emerson in the Circuit Court charging assault and false imprisonment and asking damages of $10. This was the legal procedure by which slaves might sue for their freedom.

1847 - The case came to trial in the west wing of this building on June 30. The Scotts lost, but moved for a new trial. The verdict was set aside and a new trial granted on December 2.

1848 - Mrs. Emerson protested the granting of a new trial by appealing to the Supreme Court of Missouri on a writ of error. The appeal was dismissed since the case was still pending in a lower court.

1850 - The second trial of Dred Scott's suit took place in this building on January 12. The Scotts won the verdict. Mrs. Emerson moved for a new trial, but was denied, so she again appealed to the state Supreme Court on a writ of error. In this year Mrs. Emerson was married to Dr. C. C. Chaffee, a Massachusetts man strongly opposed to slavery. The Scotts were left in St. Louis and hired out by the Circuit Court.

1852 - The Supreme Court of Missouri reversed the judgment of the Circuit Court and remanded the Scotts to slavery.

1853 - After marrying Dr. Chaffee the former Mrs. Emerson transferred ownership of her slaves to her brother, John Sanford, who had moved from St. Louis to New York. Accordingly, Dred, Harriet and their daughters, Eliza and Lizze (born at Jefferson Barracks), brought a new suit against Sanford. Being between citizens of two different states, it was a case for the Federal Courts.

1854 - The trial of Scott vs. Sanford was held in the Federal District Court on the second floor of the Papin Building which stood on the west side of Main Street. The Scotts lost the case, and their motion for a new trial was overruled. They then appealed to the Supreme Court of the United States on a writ of error.

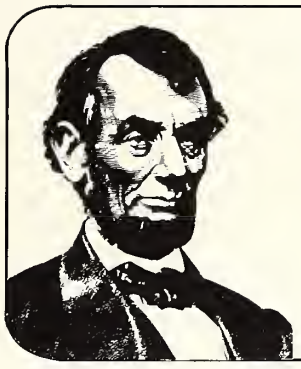
1856 - The case was argued in detail before the Supreme Court in February and again in December. This was a presidential election year with slavery a major issue.

1857 - The decision of the Supreme Court declaring that a slave was not a citizen and dismissing the case was read on March 6, 1857. Soon afterward Sanford transferred ownership in Dred Scott to Taylor Blow, son of Peter Blow. He set Dred free on May 26.

1858 - Dred Scott died in St. Louis on September 17 after 15½ months of freedom and was buried here.

- - - - - -

U. S. Dept. of Interior, Nat'l. Park Service, Jefferson Nat'l. Expansion Memorial
Old Courthouse 415 Market Street CEntral 8826
July 1949.



# Lincoln Lore

Bulletin of the Louis A. Warren Lincoln Library and Museum. Mark E. Neely, Jr., Editor.
Mary Jane Hubler, Editorial Assistant. Published each month by the
November, 1978 Lincoln National Life Insurance Company, Fort Wayne, Indiana 46801. Number 1689

## DON E. FEHRENBACHER ON THE DRED SCOTT CASE: A REVIEW

The date and place of his birth are unknown. His real name may have been Sam, but history knows him by a very different and unforgettable name. Some described him as a shiftless troublemaker; others commended his character. He was a slave. He had several masters over the years, and his master for an important period of the slave's life was a hypochondriac and a ne'er-do-well who was syphilitic and may have died of syphilis, though genteel doctors rarely wrote such diagnoses on the death certificates of genteel slaveholders. When he sued for his freedom, the resulting legal battle made his name a household word; yet it is not at all clear who owned him at the time of the suit. The man whom the slave sued was too insane by the time of the trial to care about the result and died in a mental institution. His real owner may have been an antislavery politician from Massachusetts. The slave's lawyer would become a member of Abraham Lincoln's cabinet, but the lawyer's deepest desire was to send the slave "back" to Africa if he won the case. The slave lost his case for freedom and was almost immediately freed by his master.

The slave's name, of course, was Dred Scott. His syphilitic owner, Dr. John Emerson, carried Dred to Illinois (a free state) and to territory north of 36° 30′ latitude acquired in the Louisiana Purchase (and, therefore, free territory). The doctor later died, officially of consumption, in Davenport, Iowa Territory. His insane owner and the man he sued was named John F. A. Sanford, misspelled "Sandford" in the official report of the Supreme Court — a fitting symbol of the errors that have plagued the history of this complex case. The antislavery politician was Calvin Chaffee, who married the widowed Mrs. Emerson (*nee* Sanford), the sister of John F. A. Sanford. Scott's famous lawyer was Montgomery Blair, an ardent advocate of black colonization.

Professor Don E. Fehrenbacher of Stanford University has written what is sure to be the definitive book on the subject: *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978). Yet "definitive" is not a good enough word, for a definitive book can also be ponderous, poorly written, and doggedly comprehensive without a hint of brilliance or innovation. On the contrary, this book is so clearly written as to be a model for all constitutional history written hereafter. It is as lively a treatment as is possible of an extremely difficult subject. Its conclusions are both sane and balanced on the one hand, and brilliantly perceptive and original, on the other. It is an achievement to be envied by any historian.

*From the Louis A. Warren Lincoln Library and Museum*

**FIGURE 1. Roger B. Taney (1777-1864) feared that the "South is doomed to sink to a state of inferiority, and the power of the North will be exercised to gratify their cupidity and their evil passions, without the slightest regard to the principles of the Constitution."**

Moreover, *The Dred Scott Case* is more than the best book ever written on the only Supreme Court case "every schoolboy" has heard of, it is practically a primer on constitutional law and the law of slavery, a brief history of the sectional issue in American politics, and a carefully reasoned argument about the causes of the Civil War. These are serious subjects, of course, and not ones that can merely be read about every night before going to sleep. They must be studied, and Professor Fehrenbacher's book must be studied. There is no problem with the writing style, which is lucid and lively, but the subject matter is difficult. Suffice it to say, that a chapter discussing the Lecompton constitution for Kansas, which many historians of the Civil War period regard as a nearly hopeless labyrinth of confusion, comes as a *relief* after the discussion of the issues raised in and by the Dred Scott decision.

Since *The Dred Scott Case* comprehends so many different subjects, its thesis cannot be neatly summarized in a sentence or two. In fact, it abounds in useful distinctions and insights on many different points. However, if one must say what the book argues in the main, it might be this: the Dred Scott decision was not an aberration, an inexplicably explosive decision from the hands of an otherwise restrained and erudite Chief

Justice, Roger Brooke Taney. The decision was consistent with his pro-Southern record and his willingness to see the United States Supreme Court intervene in difficult problems that plagued American politics. Moreover, the decision can be aptly characterized as a sloppy and tortured defense of Southern political interests from what militant Southerners perceived as a merciless Northern onslaught. As Fehrenbacher puts it, "the true purpose of Taney's Dred Scott opinion" was "to launch a sweeping counterattack on the antislavery movement and to reinforce the bastions of slavery at every rampart and parapet." The tone of Fehrenbacher's characterization of Taney's decision goes a good deal farther than the acknowledgment by Taney's judicious and fair-minded biographer, Carl Brent Swisher, that the Maryland-born Chief Justice wrote a decision that was defensive of the only section of the country he knew and the section he loved.

The two traits which most distinguish every part of Fehrenbacher's large book (595 pages of text and over 100 pages of footnotes) are balance and rigorous logic. Professor Fehrenbacher shares with his late colleague at Stanford, David M. Potter, a remarkable ability to show no sectional bias in any of his interpretations of American sectional conflict. He treats the causes and personalities of North and South with even-handed justice without at the same time excusing extremism and unreasonableness. It is this record of balance in appraising the sectional controversy up to the time of the Dred Scott decision which makes all the more devastating Fehrenbacher's relentless destruction of the court's opinion in that case.

The weapon of destruction is logic based on close and thoughtful reading of Taney's decision. Well before the point where he analyzes Taney's opinion, Fehrenbacher has repeatedly split arguments and distinctions into As and Bs and 1, 2, 3s — all to the benefit of the reader, always for the sake of clarification, and never with a false step. When he treats Taney's decision with the same precision, the results are remarkable.

To look closely at Taney's decision is in itself innovative despite the great fame of the Dred Scott case. The reasons for its being ignored in the past are many. Republican critics at the time, for example, were anxious to say that much of the decision was *obiter dictum,* that is, present in Taney's opinion but not crucial as a reason for deciding the case. Therefore, to many Republicans, there was no reason to examine much of the decision closely because much of the decision consisted of the irrelevant opinions of the Chief Justice on matters not at the heart of the case. Republican critics at the time, and a host of historians since, have tended also to focus on the question of the authoritativeness of the opinion as judged by how many of the Court's Justices concurred with or dissented from each of the various points made in the case. This has led to what Professor Fehrenbacher calls the "box-score method" of analyzing the Dred Scott decision, and he shows how absurd such interpretations are.

Fehrenbacher thinks it an error to seek ways of ignoring the decision. He looks at the decision itself, and what he sees in it is remarkable. Taney, for example, said that every "citizen" was a member of "the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives." This, Fehrenbacher points out, was a "gross inaccuracy": "A large majority of American citizens — namely, women and children — were not members of the sovereign people in the sense of holding power and conducting the government through their representatives." Negroes may not have been citizens but not for the reason Taney here described.

Likewise, Taney's assertion that, in the times of the Founding Fathers, Negroes "had no rights which the white man was bound to respect" was a "gross perversion of the facts." Taney's statement confused free Negroes with slaves, and, even then, "the statement was not absolutely true, for slaves had some rights at law before 1789." In fact, there were some respects in which "a black man's status was superior to that of a married white woman, and it was certainly far above that of a slave." The free black man "could marry, enter into contracts, purchase real estate, bequeathe property, and, most pertinently, seek redress in the courts." Republicans quoted Taney's harsh statement about white respect for Negro rights out of context as though it represented the Chief Justice's own views. Taney's defenders have pointed out that these were the opinions Taney said the Founding Fathers had; Taney was writing "historical narrative" here. Fehrenbacher shows that the statement was grossly prejudiced even as "historical narrative."

Taney's tortuous efforts to deny Negro citizenship were functions of his sectional fears and even of his Maryland background. He feared free Negroes, and he imputed this fear to the Founding Fathers, arguing that the slave states would never have ratified the Constitution if free Negroes had been included in the meaning of "citizens." Said Taney:

> For if they were . . . entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race . . . the right to enter every other State whenever they pleased, . . . to go where they pleased at every hour of the day or night without molestation, . . . and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.

Maryland was a state with a high population of free Negroes, and Taney's experience in such a state led him to forget that earlier in his opinion he had said that free Negroes were so few in number when the republic was founded that they "were not even in the minds of the framers of the Constitution." By his own admission, almost, Taney's mind and not the minds of the framers was dictating constitutional law here. In fact, as Fehrenbacher shows, Taney went to such lengths to exclude Negroes from the possibility of being naturalized citizens that his opinion made them *"the only people on the face of the earth who (saving a constitutional amendment) were forever ineligible for American citizenship."*

Fehrenbacher not only labels but proves Taney's history of the United States "phantasmal." He repeatedly demonstrates the Chief Justice's "chronic inability to get the facts straight." The important *obiter dictum* in the decision was not what Republicans usually criticized, but rather Taney's statement that a territorial government could not forbid slavery — "a question that had never arisen in the Dred Scott case." This, too, was a function of Southern fears. Fehrenbacher concludes that Benjamin Curtis and John McLean, the dissenting Northern Justices, "were in many respects the sound constitutional conservatives, following established precedent along a well-beaten path to their conclusions." By contrast, "Taney and his southern colleagues were the radical innovators — invalidating, for the first time in history, a major piece of federal legislation; denying to Congress a power that it had exercised for two-thirds of a century; sustaining the abrupt departure from precedent in *Scott v. Emerson* [an earlier stage of the case on its way to the Supreme Court]; and, in Taney's case, infusing the due-process clause with substantive meaning. And even though McLean did indulge his weakness for playing to the antislavery gallery, the southern justices were by far the more idiosyncratic and polemical."

It all sounds too pro-Northern to be true, but the balance with which Fehrenbacher treats the sectional crisis leading up to the decision and the balance of his appraisal of the decision's effects are the reader's assurance that Fehrenbacher's arguments have been carefully weighed. In the section of the book preceding the treatment of *Dred Scott v. Sandford,* Fehrenbacher traces the sectional controversy from the early period when the slave *interest* always triumphed over the antislavery *sentiment* in American politics, to the time when both became interests and tangled American politics in bitter and unresolvable disputes. There are far too many useful insights in this graceful, but thorough, survey to catalogue them all here, but one can at least see an example of Fehrenbacher's balanced approach.

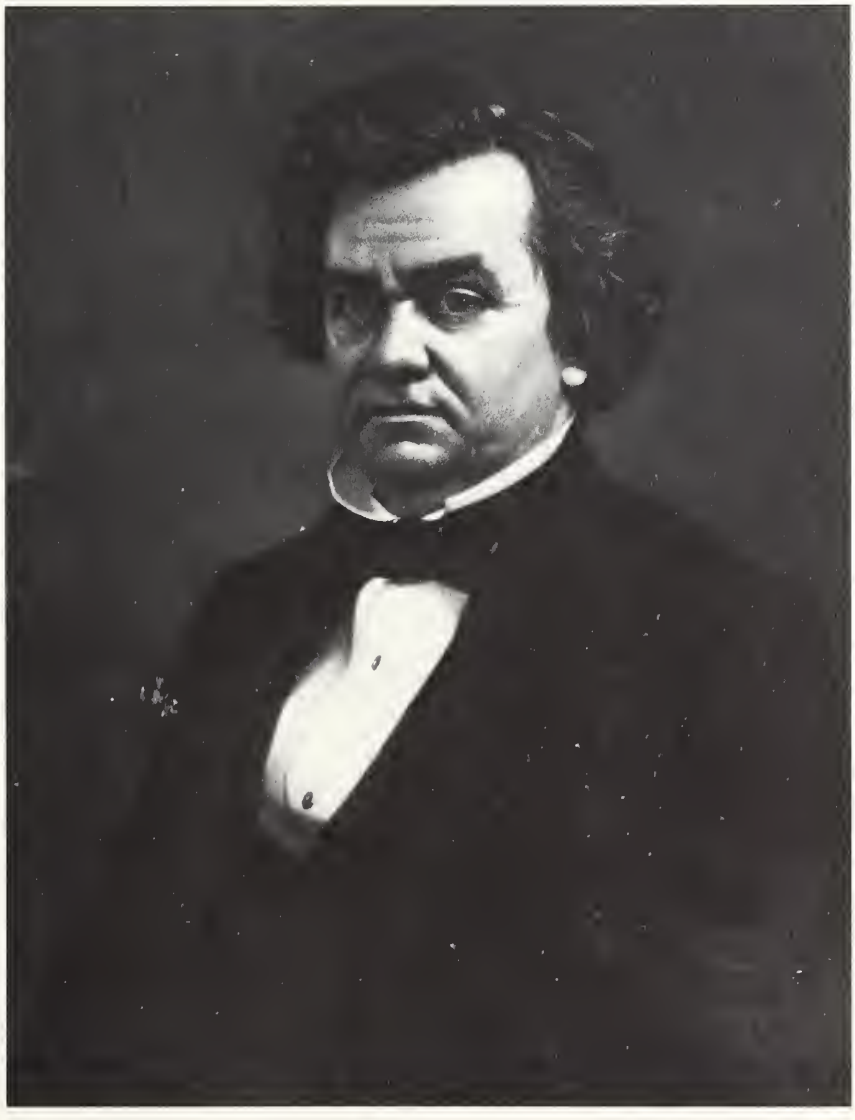
The fugitive-slave clause in the Constitution was a matter of little interest to the convention which passed it — late in the proceedings, by unanimous vote, and after little debate. Yet the myth soon arose that its passage had been essential to the acceptance of the Constitution by the slave states, a myth which was mouthed by the great Joseph Story in *Prigg v. Pennsylvania* (1842). He said the clause "constituted a fundamental article, without the adoption of which the Union could not have been formed." Thus the South gained unfair advantage here, Fehrenbacher says, and the federal govern-

ment became "a bulwark of slavery [,] . . . a development permitted but not required by the Constitution. It reflected not only the day-to-day advantage of interest over sentiment and the predominance of southern leadership in the federal government but also the waning of the liberal idealism of the Revolution." Here Professor Fehrenbacher sounds almost like the Republican Lincoln. He seems to voice an anti-Southern view of American history as a decline from the libertarian virtues of the Founding Fathers, a decline brought about the gradual erosion of the sentiment that slavery was wrong for the sake of the South's economic interest in slavery. Yet just five pages later, Fehrenbacher notes that Southerners were fair in their willingness to distinguish between "domicile" and "sojourn" in cases involving the presence of slaves in free states. If the slaveowner had taken up residence, the slaves were clearly free. If he was merely passing through on a sojourn, the slaves retained their original servile status. At first, Southern courts did not embrace the doctrine of "reattachment," whereby a slave returned to his home-state status when he returned to his home state, even if he had been in residence on free soil. Fehrenbacher says plainly, though, that the "northern states were the first to turn away from the tacit understanding" whereby courts in the two sections recognized the difference between domicile and sojourn. The quality of Southern justice did not change without provocation. This is balance.

Likewise, Fehrenbacher gives a balanced appraisal of the aftermath and consequences of the Dred Scott decision, and, as C. Vann Woodward has pointed out in another review of this book in the *New York Review of Books*, it is a modest appraisal. Fehrenbacher does not exaggerate the effects of the decision in his own views of the causes of the Civil War. If anything, he argues that the case was not as significant as historians have vaguely thought it was in causing the war.

One of Fehrenbacher's most interesting points is that the fight over the Lecompton constitution for Kansas and the personal image and reputation of Stephen A. Douglas were far more important than the Dred Scott decision in causing the war. A narrow decision which said nothing about Negro citizenship or the constitutionality of the Missouri Compromise line might not have averted sectional disaster. The effect of the Dred Scott decision was indirect. It "had no immediate legal effect of any importance except on the status of free Negroes. . . . it provoked no turbulent aftermath, presented no problem of enforcement, inspired no political upheaval." The Dred Scott decision "was in some ways like an enormous check that could not be cashed" by Southern leaders. The psychological frustration of intangible victory played a role but "only belatedly and indirectly." What was vital was "certain later developments."

The later developments in question revolved around the Lecompton controversy, "the last sectional crisis to end in compromise" and, therefore, "the close of the antebellum era in national politics." Fehrenbacher explains in a believable way the hopes and fears that were invested in that controversy. The Northern Democrats, having accepted as best they could the pro-Southern court decision, were in no condition to bear the weight of another Southern victory, and President Buchanan made a terrible error in asking them to do so. Stephen Douglas, who was much more the great compromiser of the 1850s than Henry Clay, seems out of character in spurning a practical political compromise on the Lecompton issue. Fehrenbacher carefully notes, however, Douglas's increasing inflexibility before that controversy, as



*From the Louis A. Warren Lincoln Library and Museum*

**FIGURE 2. Stephen A. Douglas, determined but a little dissipated, became the focus of fierce Southern animosity in the year of the Dred Scott decision, but not because of the decision. His break with the Buchanan administration over the Lecompton constitution for Kansas made him "suddenly, . . . a party insurgent and a doctrinaire, taking an inflexible stand on principle and in the end rejecting a compromise that satisfied even many of his fellow insurgents." Southern newspapers declared "war to the knife," and some expressed "serene indifference" to the outcome of his race against Lincoln for the United States Senate in 1858. The Mobile *Register* saw Douglas as "the worst enemy of the South and the most mischievous man now in the nation." When Democrats tried to select a nominee for President in 1860, Fehrenbacher says, "a majority . . . from the Deep South preferred to break up their party rather than accept the nomination of Douglas."**

he participated in "the fashion of constitutionalizing debate on slavery in the territories." He had already moved from recommending his solution for the territorial issue to saying that the Constitution *demanded* his solution to the issue.

When Douglas took his anti-Lecompton and anti-Southern stand, it "proved to be the crucial event that set the Democratic party on the path to disruption." The intensity of Southern attacks on Douglas was the intensity of hatred, not for an alien enemy, but for a *traitor*. As a Georgia editor put it, "Douglas was with us until the time of trial came; then he deceived and betrayed us." His defection was a symbol of the failure of the last hope for Northern fairness. Thereafter, the South was desperate and frantic. The coming of the war was at times a function of an almost *ad hominem* argument by Southerners against Douglas. Many historians have thought that the "Freeport Doctrine," announced by Douglas in his famous debates with Lincoln, made Douglas unacceptable to the South. Fehrenbacher is prepared to say, on the contrary, that the doctrine was made unacceptable by Douglas's advocacy of it.

Professor Fehrenbacher has long been associated with the view that the importance of the Freeport question has been greatly exaggerated. That was one of the revolutionary points of his brilliant book, *Prelude to Greatness: Lincoln in the 1850's*. In *The Dred Scott Case*, he is able to argue an even more convincing case for it by focusing more on Douglas than Lincoln. But what about Lincoln? How does he figure in this new work?

Fehrenbacher makes some interesting points. First, Lincoln's criticism of the Dred Scott case was not like the mainstream of Republican criticism which tried to dismiss the controversial parts of the decision as mere *obiter dicta*. Lincoln, instead, took the tack that a Supreme Court decision, though it must ultimately become authoritative, did not necessarily reach that authoritative status unless it were grounded in sound historical facts, were repeated by the Court in several decisions, represented the views of the bulk of the Justices, and met numerous other conditions that were functions of time. Likewise, Lincoln's first (and truest?) response to the decision was to denounce the historical absurdity of Taney's assertions about the state of opinion of the Founding Fathers on the Negro and to document a decline in recent times from the rather decently libertarian sentiments of the framers of the Constitution. His better-known response came a year later, in 1858, and in the midst of a dogged struggle with Douglas for the United States Senate. In negrophobic Illinois, Lincoln did not need to be seen, as Douglas tried to picture his opponent's opposition to the Dred Scott decision, as primarily concerned about Taney's denial of Negro citizenship. Illinois did not want Negro citizens, but Illinois feared Southern political power, and Lincoln thereafter characterized Taney's decision as part of a conspiracy, begun by Douglas in 1854 and continued by Presidents Pierce and Buchanan, to nationalize slavery. Lincoln concentrated less and less on the lamentable doctrines in the Dred Scott decision itself. Instead he warned of a *second* Dred Scott decision which would make not only Congress and territories but also *states* incapable of outlawing slavery.

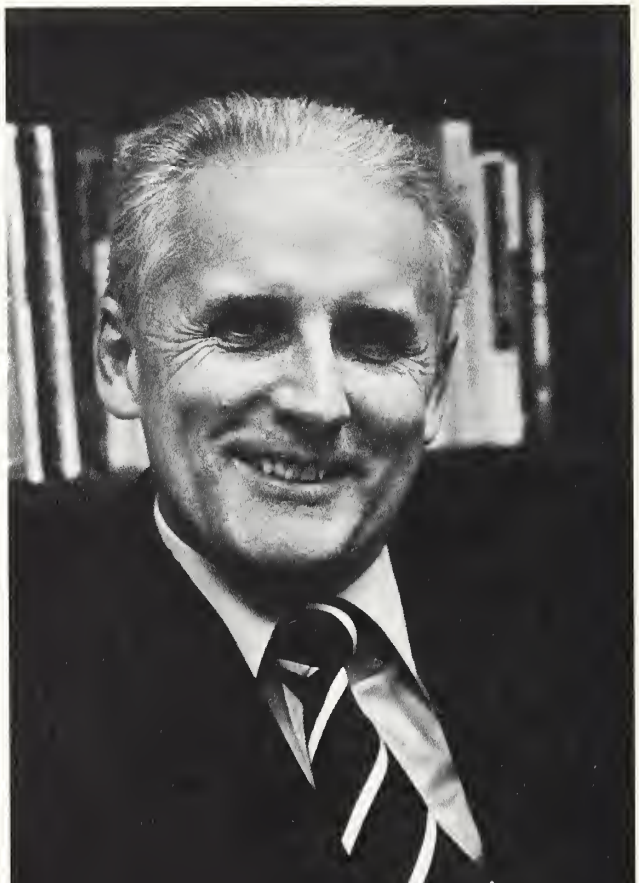
Professor Fehrenbacher further establishes his reputation as a fine writer in this book. It does seem that his prose has become slightly less formal than it used to be. He occasionally uses colloquial terms: "mixed bag" (page 342); "continuing on" (page 366); and "finish up" (page 536). Whether by calculation or by virtue of the spirit of the times, which have altered our language more in the direction of the common man, this has the effect, not of spoiling his excellent writing, but of making this book on a subject of forbidding complexity more palatable to the reader.

No book, of course, is beyond criticism. Because much of the book's import hinges on an accurate appraisal of Taney's personality and political thought, it is a shame the Chief Justice remains such a shadowy figure. The Dred Scott opinion was the opinion of a very old man; it might be interesting to know whether some of the glaring faults of the opinion followed a pattern of declining mental powers generally in his late opinions. It seems odd, given the particular shape Taney's opinion took, that there is no investigation of the doctrines of the age to which it seems an answer. That is, Salmon P. Chase and others had been forging an antislavery interpretation of the Constitution, and the Declaration of Independence loomed large in antislavery arguments. Was Taney's preoccupation with the Founding Fathers strictly a function of a judicial need to know the opinions of the framers of the document from which American law derived? Did not Republican ideology shape his defense as much as the demands of Southern interests and of constitutional law?

There are doubtless other and better questions yet to be answered, but Fehrenbacher's book answers many more questions that it begs. *The Dred Scott Case* is a great book, far too great to be comprehended in any single review (or reading). Every serious student of the period must read it, and, because of Professor Fehrenbacher's careful research and attention to clarity in writing, the reading will be an unalloyed pleasure.

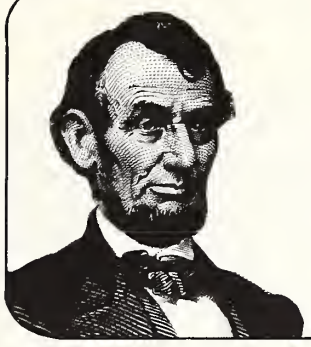
## AN IMPORTANT ANNOUNCEMENT

Professor Fehrenbacher has generously consented to present the second annual R. Gerald McMurtry Lecture. The 1979 Lecture will occur on the night of May 10, at the Louis A. Warren Lincoln Library and Museum. The Lecture is free to the public and is followed by an informal reception for the lecturer. For further information, please write Mark Neely, Louis A. Warren Lincoln Library and Museum, 1300 South Clinton Street, Fort Wayne, Indiana 46801.



*From the Louis A. Warren Lincoln Library and Museum*

**FIGURE 3. Professor Don E. Fehrenbacher.**



# Lincoln Lore

January, 1980

Bulletin of the Louis A. Warren Lincoln Library and Museum. Mark E. Neely, Jr., Editor. Mary Jane Hubler, Editorial Assistant. Published each month by the Lincoln National Life Insurance Company, Fort Wayne, Indiana 46801.

Number 1703

## LINCOLN AND SLAVERY: AN OVERVIEW

Abraham Lincoln was a native of a slave state, Kentucky. In 1811 Hardin County, where Lincoln was born two years before, contained 1,007 slaves and 1,627 white males above the age of sixteen. His father's brother Mordecai owned a slave. His father's Uncle Isaac may have owned over forty slaves. The Richard Berry family, with whom Lincoln's mother Nancy Hanks lived before her marriage to Thomas Lincoln, owned slaves. Thomas and Nancy Lincoln, however, were members of a Baptist congregation which had separated from another church because of opposition to slavery. This helps explain Lincoln's statement in 1864 that he was "naturally anti-slavery" and could "not remember when I did not so think, and feel." In 1860 he claimed that his father left Kentucky for Indiana's free soil "partly on account of slavery."

Nothing in Lincoln's political career is inconsistent with his claim to have been "naturally anti-slavery." In 1836, when resolutions came before the Illinois House condemning abolitionism, declaring that the Constitution sanctified the right of property in slaves, and denying the right of Congress to abolish slavery in the District of Columbia, Lincoln was one of six to vote against them (seventy-seven voted in favor). Near the end of the term, March 3, 1837, Lincoln and fellow Whig Dan Stone wrote a protest against the resolutions which stated that "the institution of slavery is founded on both injustice and bad policy." It too denounced abolitionism as more likely to exacerbate than abate the evils of slavery and asserted the right of Congress to abolish slavery in the District of Columbia (though the right should not be exercised without the consent of the District's citizens). Congress, of course, had no right to interfere with slavery in the states. In 1860 Lincoln could honestly point to the consistency of his antislavery convictions over the last twenty-three years. That early protest "briefly defined his position on the slavery question; and so far as it goes, it was then the same that it is now."

In his early political career in the 1830s and 1840s, Lincoln had faith in the benign operation of American political institutions. Though "opposed to slavery" throughout the period, he "rested in the hope and belief that it was in course of ultimate extinction." For that reason, it was only "a minor question" to him. For the sake of keeping the nation together, Lincoln thought it "a paramount duty" to leave slavery in the states alone. He never spelled out the basis of his faith entirely, but he had confidence that the country was ever seeking to approximate the ideals of the Declaration of Independence. All men would be free when slavery, restricted to the areas where it already existed, exhausted the soil, became unprofitable, and was abolished by the slave-holding states themselves or perhaps by numerous individual emancipations. Reaching this goal, perhaps by the end of the century, required of dutiful politicians only "that we should never knowingly lend ourselves directly or indirectly, to prevent . . . slavery from dying a natural death — to find new places for it to live in, when it can no longer exist in the old." This statement, made in 1845, expressed Lincoln's lack of concern over the annexation of Texas, where slavery already existed. As a Congressman during the Mexican War, Lincoln supported the Wilmot Proviso because it would prevent the growth of slavery in parts of the Mexican cession where the institution did not already exist. He still considered slavery a "distracting" question, one that might destroy America's experiment in popular government if politicians were to "enlarge and agrivate" it either by seeking to expand slavery or to attack it in the states.


*From the Louis A. Warren Lincoln Library and Museum*

**FIGURE 1. Like many other prints of Lincoln published soon after his death, this one celebrated the Emancipation Proclamation as his greatest act.**

Lincoln became increasingly worried around 1850 when he read John C. Calhoun's denunciations of the Declaration of Independence. When he read a similar denunciation by a Virginia clergyman, he grew more upset. Such things undermined his confidence because they showed that some Americans did not wish to approach the ideals of the Declaration of Independence; for some, they were no longer ideals at all. But these were the statements of a society directly interested in the preservation of the institution, and Lincoln did not become enough alarmed to aggravate the slave question. He began even to lose interest in politics.

The passage of Stephen A. Douglas's Kansas-Nebraska Act


*From the Louis A. Warren Lincoln Library and Museum*

**FIGURE 2. Charles Eberstadt noted fifty-two printed editions of the Emancipation Proclamation issued between 1862 and 1865. He called this one a "highly spirited Western edition embellished with four large slave scenes lithographed at the left and four freedom scenes at the right."**

in 1854 changed all this. Lincoln was startled when territory previously closed to slavery was opened to the possibility of its introduction by local vote. He was especially alarmed at the fact that this change was led by a Northerner with no direct interest in slavery to protect.

In 1841 Lincoln had seen a group of slaves on a steamboat being sold South from Kentucky to a harsher (so he assumed) slavery. Immediately after the trip, he noted the irony of their seeming contentment with their lot. They had appeared to be the happiest people on board. After the Kansas-Nebraska Act, he wrote about the same episode, still vivid to him, as "a continual torment to me." Slavery, he said, "has, and continually exercises, the power of making me miserable."

Lincoln repeatedly stated that slaveholders were no worse than Northerners would be in the same situation. Having inherited an undesirable but socially explosive political institution, Southerners made the best of a bad situation. Like all Americans before the Revolution, they had denounced Great Britain's forcing slavery on the colonies with the slave trade, and, even in the 1850s, they admitted the humanity of the Negro by despising those Southerners who dealt with the Negro as property, pure and simple — slave traders. But he feared that the ability of Northerners to see that slavery was morally wrong was in decline. This, almost as surely as disunion, could mean the end of the American experiment in freedom, for any argument for slavery which ignored the moral wrong of the institution could be used to enslave any man, white or black. If lighter men were to enslave darker men, then "you are to be slave to the first man you meet, with a fairer skin than your own." If superior intellect determined masters, then "you are to be slave to the first man you meet, with an intellect superior to your own." Once the moral distinction between slavery and freedom were forgotten, nothing could stop its spread. It was "founded in the selfishness of man's nature," and that selfishness could overcome any barriers of climate or geography.

By 1856 Lincoln was convinced that the "sentiment in favor of white slavery . . . prevailed in all the slave state papers, except those of Kentucky, Tennessee and Missouri and Maryland." The people of the South had "an immediate palpable and immensely great pecuniary interest" in the question; "while, with the people of the North, it is merely an abstract question of moral right." Unfortunately, the latter formed a looser bond than economic self-interest in two billion dollars worth of slaves. And the Northern ability to resist was steadily undermined by the moral indifference to slavery epitomized by Douglas's willingness to see slavery voted up or down in the territories. The Dred Scott decision in 1857 convinced Lincoln that the Kansas-Nebraska Act had been the beginning of a conspiracy to make slavery perpetual, national, and universal. His House-Divided Speech of 1858 and his famous debates with Douglas stressed the specter of a conspiracy to nationalize slavery.

Lincoln's claims in behalf of the slaves were modest and did not make much of the Negro's abilities outside of slavery. The Negro "is not my equal . . . in color, perhaps not in moral or intellectual endowment," Lincoln said, but "in the right to put into his mouth the bread that his own hands have earned, he is the equal of every other man, white or black." Lincoln objected to slavery primarily because it violated the doctrine of the equality of all men announced in the Declaration of Independence. "As I would not be a *slave*, so I would not be a *master*," Lincoln said. "This expresses my idea of democracy. Whatever differs from this, to the extent of the difference, is no democracy."

Lincoln had always worked on the assumption that the Union was more important than abolishing slavery. As long as the country was approaching the ideal of freedom for all men, even if it took a hundred years, it made no sense to destroy the freest country in the world. When it became apparent to Lincoln that the country might not be approaching that ideal, it somewhat confused his thinking. In 1854 he admitted that as "Much as I hate slavery, I would consent to the extension of it rather than see the Union dissolved, just as I would consent to any GREAT evil, to avoid a GREATER one." As his fears of a conspiracy to nationalize slavery increased, he ceased to make such statements. In the secession crisis he edged closer toward making liberty more important than Union. In New York City on February 20, 1861, President-elect Lincoln said:

> There is nothing that can ever bring me willingly to consent to the destruction of this Union, under which . . . the whole country has acquired its greatness, unless it were to be that thing for which the Union itself was made. I understand a ship to be made for the carrying and preservation of the cargo, and so long as the ship can be saved, with the cargo, it should never be abandoned. This Union should likewise never be abandoned unless it fails and the probability of its preservation shall cease to exist without throwing the passengers and cargo overboard. So long, then, as it is possible that the prosperity and the liberties of the people can be preserved in the Union, it shall be my purpose at all times to preserve it.

The Civil War saw Lincoln move quickly to save the Union by stretching and, occasionally, violating the Constitution. Since he had always said that constitutional scruple kept him from bothering slavery in the states, it is clear that early in the war he was willing to go much farther to save the Union than he was willing to go to abolish slavery. Yet he interpreted it as his constitutional duty to save the Union, even if to do so he had to violate some small part of that very Constitution. There certainly was no constitutional duty to do anything about slavery. For over a year, he did not.

On August 22, 1862, Lincoln responded to criticism from Horace Greeley by stating his slavery policy:

> If there be those who would not save the Union, unless they could at the same time *save* slavery, I do not agree with them. If there be those who would not save the Union unless they could at the same time *destroy* slavery, I do not agree with them. My paramount object in this struggle *is* to save the Union, and is *not* either to save or to destroy slavery. If I could save the Union without freeing *any* slave I would do it, and if I could save it by freeing *all* the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that. What I do about slavery, and the colored race, I do because I believe it helps to save the Union; and what I forbear, I forbear because I do *not* believe it would help to save the Union. I shall do *less* whenever I shall believe what I am doing hurts the cause, and I shall do *more* whenever I shall believe doing more will help the cause. I shall try to correct errors when shown to be errors; and I shall adopt new views so fast as they shall appear to be true views.
>
> I have here stated my purpose according to my view of *official* duty; and I intend no modification of my oft-expressed *personal* wish that all men every where could be free.

The Emancipation Proclamation, announced just one month later, was avowedly a military act, and Lincoln boasted of his consistency almost two years later by saying, "I have done no official act in mere deference to my abstract judgment and feeling on slavery."

Nevertheless, he had changed his mind in some regards. Precisely one year before he issued the preliminary Emancipation Proclamation, Lincoln had criticized General John C. Frémont's emancipation proclamation for Missouri by saying that "as to . . . the liberation of slaves" it was "*purely political*, and not within the range of *military* law, or necessity."

> If a commanding General finds a necessity to seize the farm of a private owner, for a pasture, an encampment, or a fortification, he has the right to do so, and to so hold it, as long as the necessity lasts; and this is within military law, because within military necessity. But to say the farm shall no longer belong to the owner, or his heirs forever; and this as well when the farm is not needed for military purposes as when it is, is purely political, without the savor of military law about it. And the same is true of slaves. If the General needs them, he can seize them, and use them; but when the need is past, it is not for him to fix their permanent future

condition. That must be settled according to laws made by law-makers, and not by military proclamations. The proclamation in the point in question, is simply "dictatorship." It assumes that the general may do *anything* he pleases—confiscate the lands and free the slaves of *loyal* people, as well as of disloyal ones. And going the whole figure I have no doubt would be more popular with some thoughtless people, than that which has been done! But I cannot assume this reckless position; nor allow others to assume it on my responsibility. You speak of it as being the only means of *saving* the government. On the contrary it is itself the surrender of the government. Can it be pretended that it is any longer the government of the U.S. — any government of Constitution and laws, — wherein a General, or a President, may make permanent rules of property by proclamation?

I do not say Congress might not with propriety pass a law, on the point, just such as General Fremont proclaimed. I do not say I might not, as a member of Congress, vote for it. What I object to, is, that I as President, shall expressly or impliedly seize and exercise the permanent legislative functions of the government.

Critics called this inconsistency; Lincoln's admireres have called it "growth." Whatever the case, just as Lincoln's love of Union caused him to handle the Constitution somewhat roughly, so his hatred of slavery led him, more slowly, to treat the Constitution in a manner inconceivable to him in 1861. Emancipation, if somewhat more slowly, was allowed about the same degree of constitutional latitude the Union earned in Lincoln's policies.

The destruction of slavery never became the avowed object of the war, but by insisting on its importance, militarily, to saving the Union, Lincoln made it constitutionally beyond criticism and, in all that really mattered, an aim of the war. In all practical applications, it was a condition of peace — and was so announced in the Proclamation of Amnesty and Reconstruction of December 8, 1863, and repeatedly defended in administration statements thereafter. He reinforced this fusion of aims by insisting that the Confederacy was an attempt to establish "a new Nation, . . . with the primary, and fundamental object to maintain, enlarge, and perpetuate human slavery," thus making the enemy and slavery one and the same.

Only once did Lincoln apparently change his mind. In the desperately gloomy August of 1864, when defeat for the administration seemed certain, Lincoln bowed to pressure from Henry J. Raymond long enough to draft a letter empowering Raymond to propose peace with Jefferson Davis on the condition of reunion alone, all other questions (including slavery, of course) to be settled by a convention afterwards. Lincoln never finished the letter, and the offer was never made. Moreover, as things looked in August, Lincoln was surrendering only what he could not keep anyway. He was so convinced that the Democratic platform would mean the loss of the Union, that he vowed in secret to work to save the Union before the next President came into office in March. He could hope for some cooperation from Democrats in this, as they professed to be as much in favor of Union as the Republicans. Without the Union, slavery could not be abolished anyhow, and the Democrats were committed to restoring slavery.

Lincoln had made abolition a party goal in 1864 by making support for the Thirteenth Amendment a part of the Republican platform. The work he performed for that measure after his election proved that his antislavery views had not abated. Near the end of his life, he repeated in a public speech one of his favorite arguments against slavery: "Whenever [I] hear any one, arguing for slavery I feel a strong impulse to see it tried on him personally."

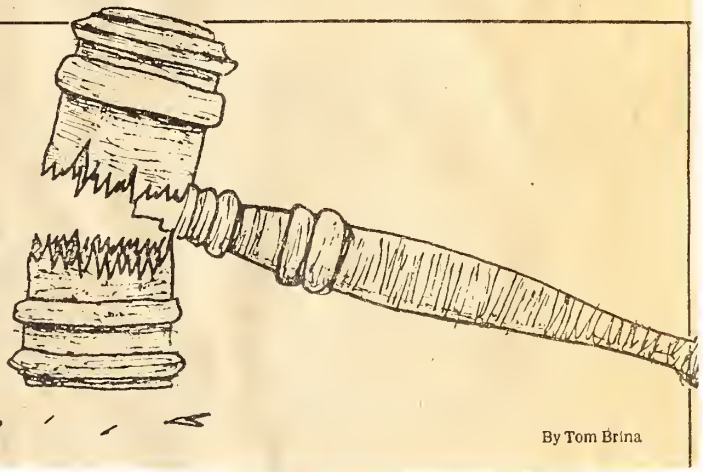

*From the Louis A. Warren Lincoln Library and Museum*

**FIGURE 3. This Indianapolis edition of the Emancipation Proclamation, published in 1886, obviously copied the edition in Figure 2. Note, however, that the harsher scenes of slavery are removed — a sign of the post-Reconstruction political ethos.**

THE WASHINGTON POST, SUNDAY, DECEMBER 19, 1982

*Hadley Arkes*

# Abortion: The Court Wasn't Persuasive



By Tom Brina

(Over)

Where does sedition lurk these days in the minds of Americans? Justice Harry Blackmun knows: behind every effort to restrain the practice of abortion, he sees the willful refusal to concede that when the Supreme court has spoken, the final, authoritative word has been said on the meaning of the Constitution. And so Blackmun loosed his terrible swift sword on the solicitor general very recently, during an argument before the court over the laws on abortion.

The justice asked Rex Lee whether the administration was requesting the court, in effect, to overrule *Roe v. Wade,* the decision that made abortions legal for virtually any reason, at any stage of the pregnancy. When Lee denied that the administration was seeking that change just yet, Blackmun replied with sarcasm that "it seems to me . . . you are asking that or you're asking that we overrule *Marbury v. Madison.*"

It is apparently a long while since Justice Blackmun has studied *Marbury v. Madison,* or he has absorbed now the fable that has been fashioned mainly by judges: that the case that established the authority of the court to interpret the Constitution also established the court as the *sole,* authoritative interpreter of the Constitution. In this superstition he is joined by most judges.

And yet, that understanding was not shared by the Founders, and it found no expression in the Constitution they framed. Nor was that understanding ever set forth by Chief Justice Marshall in his classic opinion in *Marbury v. Madison.* In later years, the supporters of the *Dred Scott* decision claimed that the court must be sovereign in settling the meaning of the Constitution. But that argument was rejected officially, decisively, by the Lincoln administration with reasoning— and precedent —that we could not wish to overturn, even today.

In *Marbury v. Madison,* Marshall had to confront a case in which a statute passed by Congress came into conflict with an explicit provision of the Constitution. If the court failed to give precedence to the Constitution, then it would implicitly lower the Constitution to the plane of an ordinary statute, which could be altered and superseded by any piece of subsequent legislation. But if the Constitution had to be regarded as "fundamental law," then it had to follow, as Marshall said, that "those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

This "judicial duty," as Marshall described it, was modestly drawn: Marshall simply recognized that the court had an obligation to be governed by the Constitution as it sought to settle the particular case that was submitted for its judgment. In that sense, nothing was claimed for the judges that could not be claimed for other officers of the government: presidents and congressmen would also be obliged to consider whether their decisions were compatible with the text or the principles of the Constitution.

Such, at any rate, was the understanding of Thomas Jefferson and Andrew Jackson, and, without that traditional understanding, it would be hard to grasp Lincoln's resistance to the *Dred Scott* decision. In that infamous case, the court "established" that blacks could not have the standing of citizens to sue in the courts, and that no man could be deprived of his property in slaves, even if he brought that property into the territories in which slavery had been forbidden by Congress.

In respecting the processes of law, Lincoln was willing to respect the disposition made by the court in settling the fate of Dred Scott in this case. But he and his party would "oppose that decision as a political rule which shall be binding on the . . . members of Congress or the President to favor no measure that does not actually concur with the principles of that decision."

Lincoln was willing, that is, to accept the judgment of the case as it bore on the conflict between two litigants. What he was not obliged to accept was the *principle* or the broader rule of law that the court was trying to create in the case. As Alexander Hamilton once remarked, the court had neither the power of the sword nor of the purse; its authority would ultimately depend on the force of its reasoned argument. In that spirit, Lincoln insisted that other officers of the government could not be obliged to accept any new "law" created by the court unless they, too, were persuaded by the force of the court's reasoning.

The Lincoln administration came to discover very quickly just how far the executive branch had been willing to apply the principle of the *Dred Scott* decision. In two notable cases arising from Boston, a black student had been denied a passport to study in France and a black inventor had been denied a patent on a new invention. Since the court had decided, in *Dred Scott,* that blacks were not citizens, the local agents of the federal government now reasoned that blacks could not carry the passports of American citizens and they could not receive patents under the laws of United States.

The Lincoln administration reversed both decisions. The attorney general announced that the administration would be guided by its own understanding: that free blacks born in the United States were citizens of the United States. A year later Lincoln would sign new legislation that banned slavery from the territories of the United States—as the president affirmed, again, that in the decisions which came under his hand he would not be bound by the "principles" declared by the court in the *Dred Scott* case.

And yet, in the understanding that now dominates the federal courts, these moves of the Lincoln administration would be regarded as unconstitutional. They would be defensible only on the understanding held by Lincoln and the Founders about the separation of powers and the responsibility of each branch to interpret the Constitution. But when Congress and the state legislatures seek, in our own day, to restrict the practice of abortion, their efforts are instantly branded as unconstitutional if they seem to be acting on the premise that abortion is wrong. Since the Supreme Court "established," in *Roe v. Wade,* that abortion is a legitimate medical procedure, it is assumed now that it is impermissible for Congress or the states to legislate upon any other premise. To do that would be treason to *Roe v. Wade,* and in the temper of Justice Blackmun, treason to *Roe v. Wade* is treason to the Constitution itself.

But if Blackmun persistently faces, on the matter of abortion, an opposition that will not be stilled, it is precisely because the court has not passed the test proposed by Hamilton: 10 years after *Roe v. Wade,* people of serious reflection have simply not found compelling or persuasive the reasons offered by the court. A majority of women remain convinced that life begins at conception, that the offspring of Homo sapiens cannot be anything other than human from its very beginning, and that the matter cannot be, as Blackmun suggested, an inscrutable religious question.

In the spirit of Lincoln, legislators in Congress and the states are claiming their right to honor their own judgments in the matters that come before them; and in the spirit of the separation of powers—the spirit of shared powers and reasoned exchange—they would urge the court to take a sober second look at what it has done and consider the possibility that it might have been mistaken.

***"When Congress and the state legislatures seek . . . to restrict the practice of abortion, their efforts are instantly branded as unconstitutional if they seem to be acting on the premise that abortion is wrong."***

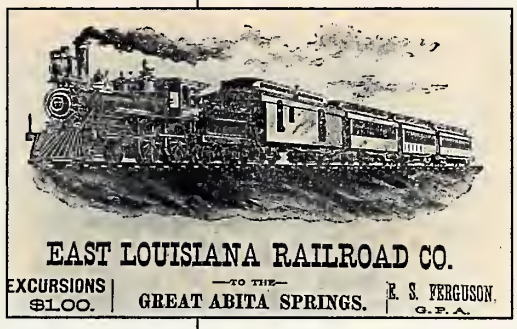
---

*The writer is Cromwell professor of jurisprudence at Amherst College and is currently a visiting Leavy professor at Georgetown University.*

Life
Fall, 1987

▼ **Gibbons v. Ogden, 1824:** Aaron Ogden held a monopoly (granted by the New York state legislature) on steamboat service between New York City and New Jersey. He sued Thomas Gibbons *(below)*, a wealthy Georgian lawyer who had a federal license to ply the same waters. The Supreme Court sided with Gibbons—and asserted that Congress, not the states, had the right to regulate interstate commerce.

► **Lochner v. New York, 1905:** Convicted of violating a New York law that established a 10-hour workday for bakers, German immigrant Joseph Lochner (right, with family and two employees), who ran a Utica confectionery, appealed to the Supreme Court. Arguing that the statute was an example of "meddlesome interferences with the rights of the individual," which infringe on the "liberty of contract" between employer and employee, the court voided the law. Justice Rufus Peckham observed that the law did not safeguard the public. "Clean and wholesome bread does not depend upon whether the baker works but ten hours a day or only sixty hours a week." Although the Supreme Court has since allowed legislation of working hours, *Lochner* was among the first cases forcing states to comply with constitutional protections of individual rights.




◄ **Dred Scott v. Sandford, 1857:** In 1834 a St. Louis army doctor took his slave Dred Scott *(left)* to Illinois, a free state, and then to a federal territory that also forbade slavery. They remained for almost five years before returning to St. Louis. Eight years later Scott sued for his freedom on the ground that having resided in free territory, he was no longer a slave. It took 11 more years for the case to reach the Supreme Court, by which time Scott had been sold to John Sanford of New York (the court mistakenly inserted a *d*), who planned to free him regardless of the outcome. Seven of the justices, of whom five were southerners, declared that Scott's status was governed by Missouri's laws and that Congress could not bar slavery in the territories. This infamous decision further inflamed a nation divided over slavery. Scott died 10 years before the 14th Amendment, ratified in 1868, recognized blacks as citizens and guaranteed all races the full protection of the law.

▲ **Plessy v. Ferguson, 1896:** Homer Plessy, a New Orleans black, was arrested when he refused to budge from the "whites only" coach of the East Louisiana Railroad. The court rejected Plessy's argument that the 14th Amendment allowed him to sit where he pleased and ruled that as long as accommodations set aside for blacks were "equal" to those reserved for whites, his rights had not been violated. The ruling introduced the doctrine of "separate but equal" into the nation's legal vocabulary. Justice John Marshall Harlan, the sole dissenter, declared the ruling "quite as pernicious as the decision made by this tribunal in the Dred Scott Case."

**National Archives and Records Administration**

AMERICAN Originals

## Civil War and Reconstruction (1850-1877)

### Dred Scott Decision

On its way to the United States Supreme Court, the Dred Scott case grew in scope and significance as slavery became the single most explosive issue in American politics. By the time the case reached the high court, it had come to have enormous political implications for the entire nation. On March 6, 1857, Chief Justice Roger B. Taney read the majority opinion of the Court, which stated that black people were not citizens of the United States and, therefore, could not expect any protection from the federal government or the courts; the opinion also stated that Congress had no authority to ban slavery from a federal territory. The decision of Scott v. Sandford, considered by legal scholars to be the worst ever rendered by the Supreme Court, was overturned by the 13th and 14th amendments to the Constitution, which abolished slavery and declared all persons born in the United States to be citizens of the United States.

Judgment in the U.S. Supreme Court Case Dred Scott v. John F. A. Sandford, March 6, 1857

No 7

Dred Scott Def in Er

vs

John F. A. Sanford

In error to the Circuit Court of the United States for the District of Missouri.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Missouri and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be and the same is hereby reversed for the want of jurisdiction in that Court, and that this cause be and the same is hereby remanded to the said Circuit Court with directions to dismiss the cause for the want of jurisdiction in that Court.

Js. Mc Ch. Rr. Taney

6th March 1857